

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

MICHAEL DEANDRE JOHNSON,

Plaintiff,

V.

U CITY PD, et al.,

Defendants.

No. 4:20-cv-00014-JMB

MEMORANDUM AND ORDER

This matter is before the Court on the motion of plaintiff Michael DeAndre Johnson for leave to commence this civil action without prepayment of the required filing fee. (Docket No. 3). Having reviewed the motion and the financial information submitted in support, the Court has determined that plaintiff lacks sufficient funds to pay the entire filing fee, and will assess an initial partial filing fee of \$1.00. *See* 28 U.S.C. § 1915(b)(1). Additionally, for the reasons discussed below, the Court will order plaintiff to file an amended complaint.

28 U.S.C. § 1915(b)(1)

Pursuant to 28 U.S.C. § 1915(b)(1), a prisoner bringing a civil action in forma pauperis is required to pay the full amount of the filing fee. If the prisoner has insufficient funds in his or her prison account to pay the entire fee, the Court must assess and, when funds exist, collect an initial partial filing fee of 20 percent of the greater of (1) the average monthly deposits in the prisoner's account, or (2) the average monthly balance in the prisoner's account for the prior six-month period. After payment of the initial partial filing fee, the prisoner is required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency having custody of the prisoner will forward these monthly

payments to the Clerk of Court each time the amount in the prisoner's account exceeds \$10.00, until the filing fee is fully paid. *Id.*

Plaintiff has not submitted an inmate account statement as required by 28 U.S.C. § 1915(a)(2). Nevertheless, having reviewed the information contained in the motion, the Court will require plaintiff to pay an initial partial filing fee of \$1.00. *See Henderson v. Norris*, 129 F.3d 481, 484 (8th Cir. 1997) (when a prisoner is unable to provide the Court with a certified copy of his prison account statement, the Court should assess an amount “that is reasonable, based on whatever information the court has about the prisoner’s finances”). If plaintiff is unable to pay the initial partial filing fee, he must submit a copy of his prison account statement in support of his claim.

Legal Standard on Initial Review

Under 28 U.S.C. § 1915(e)(2), the Court is required to dismiss a complaint filed in forma pauperis if it is frivolous, malicious, or fails to state a claim upon which relief can be granted. To state a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate a plausible claim for relief, which is more than a “mere possibility of misconduct.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678. Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw upon judicial experience and common sense. *Id.* at 679. The court must “accept as true the facts alleged, but not legal conclusions or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Barton v. Taber*, 820 F.3d 958, 964 (8th Cir. 2016). *See also Brown v. Green Tree Servicing LLC*, 820 F.3d 371, 372-73 (8th Cir. 2016) (stating that court must accept factual allegations in complaint as true, but is not required to “accept as true any legal conclusion couched as a factual allegation”).

When reviewing a pro se complaint under § 1915(e)(2), the Court must give it the benefit of a liberal construction. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). A “liberal construction” means that if the essence of an allegation is discernible, the district court should construe the plaintiff’s complaint in a way that permits his or her claim to be considered within the proper legal framework. *Solomon v. Petray*, 795 F.3d 777, 787 (8th Cir. 2015). However, even pro se complaints are required to allege facts which, if true, state a claim for relief as a matter of law. *Martin v. Aubuchon*, 623 F.2d 1282, 1286 (8th Cir. 1980). *See also Stone v. Harry*, 364 F.3d 912, 914-15 (8th Cir. 2004) (stating that federal courts are not required to “assume facts that are not alleged, just because an additional factual allegation would have formed a stronger complaint”). In addition, affording a pro se complaint the benefit of a liberal construction does not mean that procedural rules in ordinary civil litigation must be interpreted so as to excuse mistakes by those who proceed without counsel. *See McNeil v. United States*, 508 U.S. 106, 113 (1993).

The Complaint

Plaintiff is a self-represented litigant. At the time he filed this complaint, he was incarcerated in the St. Louis County Justice Center in Clayton, Missouri. He brings this action pursuant to 42 U.S.C. § 1983 naming the University City Police Department, and John Does #1-7 as defendants. (Docket No. 1 at 1). Defendants are sued in both their individual and official capacities. (Docket No. 1 at 2-3).

In the complaint, plaintiff states that Lieutenant John Doe #1 came to his residence in University City to check on plaintiff’s “infant daughter,” in order “to assure she was ok, and safe.” (Docket No. 1 at 5). Plaintiff brought his daughter “to the downstairs garage door where” Lieutenant Doe #1 was waiting. Once there, plaintiff alleges that Lieutenant Doe #1 “grabbed” the daughter from plaintiff, and “tossed her” to Officer John Doe #2. Thereafter, Lieutenant Doe #1

“rushed inside [the] basement door” with Officer Doe #3 and Officer Doe #4. Plaintiff states that the officers entered his residence without a search warrant or permission. At this point, plaintiff acknowledges becoming “uncooperative,” as “his daughter had been kidnapped by State Agents.” Plaintiff does not provide the date this occurred, but states that it was approximately 5:00 p.m.

On October 19, 2019, plaintiff states that University City police officers came to his residence at approximately 3:30 p.m. (Docket No. 1 at 6). He claims that officers “unlawfully entered” his residence “without the benefit of a search warrant.” Once inside, Lieutenant Doe #1 “unlawfully arrested” plaintiff and seized a firearm from his left pocket. Plaintiff claims that Officer Doe #3, who assisted in the arrest, injured plaintiff’s left thumb by “pulling it to [plaintiff’s] wrist.”

Plaintiff was taken to SSM-Clayton, where he “refused any/all medical treatment.” After refusing treatment, plaintiff was found fit for confinement and taken to the University City Police Station. Plaintiff states that he “was uncooperative,” whereupon officers chained his hands and feet to two bedposts. He asserts he was wearing only underwear, and “lying on his stomach in his own blood and urine.” Plaintiff further claims that Officer Doe #3 questioned plaintiff about the firearm, but that he had not been read his *Miranda* rights.

As a result of these alleged events, plaintiff is seeking \$15,000 in damages per defendant, for embarrassment and mental suffering. (Docket No. 1 at 7).

Discussion

Plaintiff is a self-represented litigant who brings this civil action pursuant to 42 U.S.C. § 1983. The complaint names the University City Police Department and John Does #1-7 as defendants. For the reasons discussed below, plaintiff’s complaint is defective and subject to dismissal. However, the Court will allow him to file an amended complaint.

A. Deficiencies in Complaint

Plaintiff's complaint is deficient and subject to dismissal in several respects. To begin, plaintiff's claim against the University City Police Department must fail, because it is not a suable entity. *See Ketchum v. City of West Memphis, Ark.*, 974 F.2d 81, 82 (8th Cir. 1992) (stating that "departments or subdivisions" of local government are not "juridical entities suable as such"). Furthermore, even if University City was substituted as the proper party defendant, plaintiff has not stated a municipal liability claim against it. *See Mick v. Raines*, 883 F.3d 1075, 1079 (8th Cir. 2018) (explaining that municipal liability may attach if a constitutional violation "resulted from (1) an official municipal policy, (2) an unofficial custom, or (3) a deliberately indifferent failure to train or supervise"). The official capacity claims against John Does #1-7 are similarly subject to dismissal, as those claims are actually against their employer, University City. *See White v. Jackson*, 865 F.3d 1064, 1075 (8th Cir. 2017) (stating that in an official capacity claim against an individual, the claim is actually "against the governmental entity itself").

With regard to the individual defendants, plaintiff lists seven John Does, who are employed by the University City Police Department. However, he only mentions John Does #1-4 in the body of the complaint, without making any allegations against John Does #5-7. Indeed, John Does #5-7 appear only in the caption. This is insufficient to assert their responsibility for any constitutional violation. *See Allen v. Purkett*, 5 F.3d 1151, 1153 (8th Cir. 1993) (agreeing with district court dismissal of two defendants who were named as defendants in the complaint, but who had no factual allegations made against them).

With regard to plaintiff's excessive force claim, plaintiff has not demonstrated that he was unreasonably seized. *See Andrews v. Fuoss*, 417 F.3d 813, 818 (8th Cir. 2005) ("The right to be free from excessive force is included under the Fourth Amendment's prohibition against

unreasonable seizures of the person”). That is, plaintiff alleges only that he was arrested, that he was injured during this process, and that he was ultimately “chained” to a bed, after he acted in an admittedly “uncooperative” manner. These facts are insufficient to establish the force used against him was unreasonable. *See Burnikel v. Fong*, 886 F.3d 706, 710 (8th Cir. 2018) (stating that relevant factors as to the reasonableness of an officer’s conduct include “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight”).

Likewise, with regard to plaintiff’s unlawful search claim, plaintiff has not presented facts showing that the search was unreasonable. While warrantless searches inside a home are presumptively unreasonable, “the ultimate touchstone of the Fourth Amendment is reasonableness, [and] and the warrant requirement is subject to certain exceptions.” *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). Here, plaintiff states only that the search was warrantless and lacked consent, without providing any more factual detail as to the search’s context. This is insufficient to demonstrate unreasonableness.

For all these reasons, plaintiff’s complaint is subject to dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B). However, as plaintiff is proceeding as a self-represented litigant, he will be given an opportunity to file an amended complaint according to the instructions set forth below.

B. Amendment Instructions

Plaintiff should type or neatly print his amended complaint on the Court’s civil rights form, which will be provided to him. *See* E.D. Mo. L.R. 2.06(A) (“All actions brought by self-represented plaintiffs or petitioners should be filed on Court-provided forms”). If the amended complaint is handwritten, the writing must be legible. In the “Caption” section of the Court-provided form, plaintiff should clearly name each and every party he is intending to sue. *See* Fed.

R. Civ. P. 10(a) (“The title of the complaint must name all the parties”). If there is not enough room in the caption, plaintiff may add additional sheets of paper. However, all the defendants must be clearly listed. Plaintiff should fill out the complaint form in its entirety.

In the “Statement of Claim” section, plaintiff should provide a short and plain statement of the factual allegations supporting his claim. *See* Fed. R. Civ. P. 8(a). Plaintiff should put each claim into a numbered paragraph, and each paragraph should be “limited as far as practicable to a single set of circumstances.” *See* Fed. R. Civ. P. 10(b).

The amended complaint should only include claims that arise out of the same transaction or occurrence. In other words, plaintiff should only include claims that are related to each other. *See* Fed. R. Civ. P. 20(a)(2). Alternatively, plaintiff may choose a single defendant and set forth as many claims as he has against that defendant. *See* Fed. R. Civ. P. 18(a).

In structuring his amended complaint, plaintiff should begin by writing the defendant’s name. In separate, numbered paragraphs under that name, plaintiff should write a short and plain statement of the factual allegations supporting his claim against that specific defendant. If plaintiff is suing more than one defendant, he should follow the same procedure for each defendant.

With the exception of the University City Police Department, every defendant in plaintiff’s original complaint was a fictitious party. The Court advises plaintiff that an action may proceed against an unknown party only if the complaint makes “allegations specific enough to permit the identity of the party to be ascertained after reasonable discovery.” *See Estate of Rosenberg by Rosenberg v. Crandell*, 56 F. 3d 35, 37 (8th Cir. 1995).

Plaintiff must specify whether he intends to sue each defendant in an official capacity, an individual capacity, or both. The failure to sue a defendant in his or her individual capacity may result in the dismissal of that defendant.

If plaintiff is suing a defendant in an individual capacity, he is required to allege facts demonstrating the personal responsibility of the defendant for harming him. *See Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990) (stating that § 1983 liability “requires a causal link to, and direct responsibility for, the deprivation of rights”). Furthermore, the Court emphasizes that the “Statement of Claim” requires more than “labels and conclusions or a formulaic recitation of the elements of a cause of action.” *See Neubauer v. FedEx Corp.*, 849 F.3d 400, 404 (8th Cir. 2017).

If plaintiff is suing multiple defendants, it is important that he establish the responsibility of each separate defendant for harming him. That is, for each defendant, plaintiff must allege facts showing how that particular defendant’s acts or omissions violated his constitutional rights. It is not enough for plaintiff to make general allegations against all the defendants as a group. Rather, plaintiff needs to provide the role of each named defendant in this case, in order that each specific defendant can receive notice of what he or she is accused of doing. *See Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 848 (8th Cir. 2014) (stating that the essential function of a complaint “is to give the opposing party fair notice of the nature and basis or grounds for a claim”).

Plaintiff is warned that the filing of an amended complaint **completely replaces** the original complaint. This means that claims that are not re-alleged in the amended complaint will be deemed abandoned. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 928 (8th Cir. 2005) (“It is well-established that an amended complaint supercedes an original complaint and renders the original complaint without legal effect”).

After receiving the amended complaint, the Court will review it pursuant to 28 U.S.C. § 1915. Plaintiff’s failure to make specific factual allegations against a defendant will result in the dismissal of that defendant. If plaintiff fails to file an amended complaint on a Court-provided

form within thirty days in accordance with the instructions set forth herein, the Court will dismiss this action without prejudice and without further notice to plaintiff.

C. Motion to Appoint Counsel

Plaintiff has filed a motion to appoint counsel. (Docket No. 2). In civil cases, a pro se litigant does not have a constitutional or statutory right to appointed counsel. *Ward v. Smith*, 721 F.3d 940, 942 (8th Cir. 2013). *See also Stevens v. Redwing*, 146 F.3d 538, 546 (8th Cir. 1998) (stating that “[a] pro se litigant has no statutory or constitutional right to have counsel appointed in a civil case”). Rather, a district court may appoint counsel in a civil case if the court is “convinced that an indigent plaintiff has stated a non-frivolous claim...and where the nature of the litigation is such that plaintiff as well as the court will benefit from the assistance of counsel.” *Patterson v. Kelley*, 902 F.3d 845, 850 (8th Cir. 2018). When determining whether to appoint counsel for an indigent litigant, a court considers relevant factors such as the complexity of the case, the ability of the pro se litigant to investigate the facts, the existence of conflicting testimony, and the ability of the pro se litigant to present his or her claim. *Phillips v. Jasper Cty. Jail*, 437 F.3d 791, 794 (8th Cir. 2006).

After reviewing these factors, the Court finds that the appointment of counsel is not warranted at this time. As explained above, plaintiff’s complaint is subject to dismissal, and plaintiff is being ordered to file an amended complaint. The Court will entertain future motions for appointment of counsel as the case progresses, if appropriate.

Accordingly,

IT IS HEREBY ORDERED that plaintiff’s motion for leave to proceed in forma pauperis (Docket No. 3) is **GRANTED**.

IT IS FURTHER ORDERED that plaintiff must pay an initial partial filing fee of \$1.00 within **thirty (30) days** of the date of this order. Plaintiff is instructed to make his remittance payable to “Clerk, United States District Court,” and to include upon it: (1) his name; (2) his prison registration number; (3) the case number; and (4) the statement that the remittance is for an original proceeding.

IT IS FURTHER ORDERED that plaintiff’s motion to appoint counsel (Docket No. 2) is **DENIED** at this time.

IT IS FURTHER ORDERED that the Clerk of Court shall send to plaintiff a copy of the Court’s prisoner civil rights complaint form.

IT IS FURTHER ORDERED that plaintiff shall have **thirty (30) days** from the date of this order in which to file an amended complaint on the Court-form in accordance with the instructions set forth above.

IT IS FURTHER ORDERED that if plaintiff fails to comply with this order, this action will be dismissed without prejudice and without further notice.

IT IS FURTHER ORDERED that upon the filing of plaintiff’s amended complaint, the Court will review it pursuant to 28 U.S.C. § 1915.

Dated this 10th day of June, 2020.

/s/ **John M. Bodenhausen**
JOHN M. BODENHAUSEN
UNITED STATES MAGISTRATE JUDGE